

Appendix N

Comments and Responses on the November 14, 2002, Proposed Rule and
Draft Environmental Impact Statement (66 FR 69078)

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During the public comment period for the Proposed Rule and Draft EIS, we received comments (verbal and written) from approximately 8,000 private citizens, businesses, non-governmental organizations, State and Federal agencies, and local governments. Of the approximately 8,000 verbal and written comments, a majority were considered to be form letters, with little or no additional information provided beyond the scripted text. We identified about 20 distinct form letters. A representative of each form letter was reviewed with the remaining non-form letters and verbal comments, reducing the number of “unique” comments to approximately 1,500. These comments were then reviewed by a team of biologists from the Jacksonville and Vero Beach, Florida, Field Offices, as well as individuals from the Service’s Regional Office in Atlanta, Georgia. A bulk of the comments were general in nature and many reoccurring themes, ideas, suggestions, concerns, etc., were identified and grouped. Several comments letters were very specific and detailed, but also fell under the same reoccurring themes identified in the more general comments. The comments were broken into three broad categories, biological/procedural, legal, and economic. Comments in each category were distributed to Service staff biologists, the Department of Interior’s Office of the Solicitor, and the economic team, respectively, who have been involved in the rulemaking process to further group the comments, as appropriate, and draft responses.

BIOLOGICAL/PROCEDURAL ISSUES

Comment 1: Several commenters raised the concern that we did not identify a specific OSP level for the Florida manatee in our Proposed Rule.

Response 1: The MMPA and our regulations do not require us to determine what OSP is, but rather to determine that the authorized level of take will not significantly delay a stocks increase toward OSP (54 FR 40341). We agree that defining OSP would be helpful in making biologically sound determination regarding the effects of incidental take on the Florida manatee population. For this reason, we continue to work on a methodology that will allow us to do so, such as the Incidental Take Model (Runge *et al.* unpublished analysis) that includes a component that forecasts warm water carrying capacity. To date, peer review of this model has not been conducted (see below for further discussion of peer review). We will continue to work with the Manatee Recovery Team working groups (*e.g.*, the Population Status Working Group, Habitat Working Group, and Warm Water Task Force), partners, and stakeholders to improve our understanding of the manatee carrying capacity issue.

Comment 2: Several commenters “criticized” or “raised concerns” with what they believed were fundamental problems with our negligible impact rationale. One commenter argued that our rationale identifies two standards: (1) take should not significantly delay achievement of OSP, and (2) take should represent only a small portion of annual net productivity. This commenter noted that we combined these into one standard and argued that the two are distinctly different and both are necessary to ensure that take has only a “negligible impact” on the species.

Response 2: The Service believes that there was a reasonable certainty, by using the negligible impact standard (*i.e.*, population benchmarks) announced in the Proposed Rule that the incidental take would not significantly increase the time needed for a stock to reach OSP. 67 FR 69086. We believed this standard was consistent with our regulatory definition of “negligible impact” (50 CFR 18.27) and Congressional intent.

It should be noted that, in addition to the negligible impact standard described in the Proposed Rule, we compared the preliminary outputs of the model to other suggested methods of determining negligible impact levels (*i.e.*, PBR level and FEG). Table 6 and Table 7 summarize the most recent data, which includes the manatee survival and growth rates. We have also compared different suggested methodologies in our analysis. We acknowledge the concerns regarding our proposed negligible impact standard (*i.e.*, population benchmarks), and recognize the need to re-evaluate our negligible impact standard and complete the modeling analysis and peer review.

Comment 3: Many comments were received regarding our equating achievement of the demographic benchmarks with progressing toward OSP at a biologically acceptable rate. It was noted that due to the way in which the benchmarks are structured, it is possible that the stocks could meet the population benchmarks without making substantial progress toward OSP. This is because the benchmarks specify a range and not a target value for each of the population parameters. For example, the population growth rate benchmark is 95 percent certainty that the growth rate in each stock is greater than zero. Therefore, it is possible that a stock could be growing at a very slow rate, but have very tight confidence intervals such that the lower bound of the 95 percent confidence interval is greater than zero. In fact the structure of the benchmarks is such that we can only rely on them to appropriately protect manatees when our data are poor and our confidence intervals are wide. The better our data, the narrower the confidence intervals get and the more likely it is that we are failing to meet our stated goal (progress toward OSP at a biologically acceptable rate). It was further noted that due to the nature of the demographic benchmarks it is possible for a stock to meet the benchmarks in the face of levels of incidental take equivalent to a large percentage of annual net productivity. The commenter noted that this was contrary to the generally accepted concept of a negligible impact.

Response 3: A fundamental planning consideration for the Proposed Rule was the rationale and methodology for making the negligible impact determination. Our basic rationale for assessing effects was described in the Proposed Rule. In the Proposed Rule we concluded that the Florida manatee population could be considered to be “healthy” and able to sustain itself after the demographic benchmarks were met for all four stocks based on at least a 20-year data set. Assuming that none of the stocks were severely depleted when data collection relative to the demographic benchmarks began (in the late 1970s and 1980s), twenty years of continued growth at the benchmark rates would in all likelihood result in stocks that are within or near the range of OSP. As such, we have determined that it is reasonable to assume that achievement of the demographic benchmarks will result in a population that is within or near the range of OSP, and that the negligible impact threshold would be that level of incidental take that does not significantly increase the time needed to achieve the demographic benchmarks.” (67 FR 69087)

Comment 4: Several commenters raised concerns that we had not adequately addressed the sub-lethal effects of incidental take or the effects to manatee habitat.

Response 4: In the Proposed Rule, we stated that the vast majority of available information regarding the effects of watercraft related activities on manatees is related to lethal take but that for the purposes of our analysis, we assumed that “activities that result in the lethal take of manatees also have similar levels of sublethal effects on manatees and manatee habitat” (67 FR 69085). The model includes a habitat component related to warm water carrying capacity, which was just recently identified and will need to be reviewed. Effects to other habitat components were discussed qualitatively in the Draft EIS, because there are no data to indicate that other components of manatee habitat (*e.g.*, seagrass) are likely to become limiting factors in the foreseeable future.

Sublethal injury to manatees due to boat interactions may be a significant factor in maintaining a healthy and viable population, and is being considered. In that regard, most manatee carcasses examined bear scars from previous strikes with watercraft (Wright *et al.* 1995), and a significant number of living, but scarred, manatees exist. A photo-identification system and database of scarred manatees currently maintained by the Sirenia Project (Beck and Reid 1995) contain only individuals with distinct scars, the vast majority of which appear to have been inflicted by propeller blades or keels. This database now documents 1,184 living individuals scarred from collisions with boats. Most of these manatees (1,153, or 97 percent) have more than one scar pattern, indicating multiple strikes with boats. However, the actual effects of such injuries on manatee recruitment and survival have not been documented. We agree that the analysis of the sublethal incidental take and effects on habitat could be improved with additional research. As state above, we also believe it will be necessary to further evaluate our rationale for determining what “negligible impact” means for the Florida manatee stocks, the parameters and assumptions going into the Incidental Take Model, and the available and new data, and new analysis conducted since the Draft EIS. In order to facilitate these evaluations and improve on the methods for the future, we will continue working with the experts, our partners, and stakeholders through various working groups under the Recovery Team.

Comment 5: A variety of concerns were raised by commenters regarding mitigating measures in the Proposed Rule. Concerns ranged from lack of specificity in the mitigating measures that would be required in the Atlantic Stock, to suggestions that the USJ and/or NW stocks should also be required to implement additional mitigating measures prior to the Service issuing any LOA in the area, to the suggestion that the implementation of mitigating measures and/or the improvement of existing measures would result in a “negligible impact” finding for the SW Stock. Additionally, public comments provided many suggestions for additional measures that could be implemented to reduce the level of watercraft related incidental take.

Response 5: We acknowledge that the concerns regarding mitigating measures was helpful and our goal is to be able to provide the appropriate level of specificity in LOAs or future proposals. Many of the suggestions provided during the comment period have the potential to be incorporated as either mitigating measures (conditions of a LOA) or into future proposals. It is also possible that some of the suggestions could be considered as general conservation measures independent of a MMAP rulemaking process in an effort to reduce the impacts of watercraft related incidental take on all stocks. We encourage local, State, and Federal agencies as well as private entities to continue in their efforts to reduce watercraft related incidental take and to participate in the evaluation of the

effectiveness of these efforts. We hope to accomplish this with the participation of experts, partners, and stakeholders through, for example, WGWIT and other forums that will allow the exchange and evaluation of ideas regarding new mitigating measures as well as an evaluation of the effectiveness of existing measures.

Comment 6: A great number of commenters expressed concern about the effects of this rulemaking on the authorization of watercraft facilities such as docks, marinas and boat ramps. Many were also concerned about the potential adverse effects of the rule on the ability to obtain authorization for construction of new watercraft facilities; particularly, the individual and regional economic impacts of perceived rule-related curtailment or prevention of dock construction.

Response 6: We wish to clarify the effects of the rulemaking. The Florida manatee is listed as an endangered species under the ESA and is a marine mammal. As such, both the MMPA and ESA prohibit the incidental take of Florida manatees in the course of otherwise lawful activities, unless authorized. These prohibitions have been in place since 1972 for the MMPA and 1973 for the ESA. Through section 7 of the ESA, the Service can authorize the incidental take of threatened and endangered species that are reasonably certain to occur as a result of Federal actions as long as the specific ESA requirements are met. *However, if the listed species is a marine mammal, incidental take regulations under the MMPA must be in place before incidental take under the ESA can be authorized.* The need for this action results from the fact that there currently is no authorization for the incidental, unintentional death, injury, or harassment of Florida manatees associated with watercraft access and use in Florida waters. Thus, there is a need to examine the issue of take of Florida manatees and determine where the incidental, unintentional take of manatees may be authorized. Under the provisions of the MMPA, the Secretary of the Interior may authorize the incidental taking of small numbers of marine mammals in a specified geographic area if the Secretary finds, based on the best scientific evidence available, that the total taking for the authorized period will have no more than a negligible impact on the species or stock. If this finding is made, specific regulations will be established for the activities that describe permissible methods of taking; means of effecting the least practicable adverse impact on the species and its habitat; and requirements for monitoring and reporting.

This rulemaking would provide the necessary mechanism that would allow the Service to authorize incidental take under section 7 of the ESA, which has the greatest influence on the permitting process. Over the past two years we have made several alterations to our section 7 procedures related to Corps authorization of new watercraft facilities. Many commenters apparently believed that these changes were precipitated by the Proposed Rule, which is not the case. Rather, these changes occurred during the same time period as development and publication of the Proposed Rule due to the fact that both are related to resolution of the *Save the Manatee Club et al. v. Ballard* litigation. We understand the confusion this has created, and we are continuing to refine our section 7 consultation procedures to ensure appropriate and consistent implementation.

Comment 7: Some commenters stated that they do not believe that authorizing the construction of, or funding the construction of docks result in the incidental take of manatees. Many also stated that we were incorrect in determining that the authorization of a watercraft facility could indirectly result in incidental take of manatees. Commenters did, however, state that boating may result in the take of manatees.

Response 7: Section 7 of the ESA imposes both procedural and substantive requirements on Federal agencies. Federal agencies must consult on actions that they believe may affect listed species. The Federal agency must consider all areas, during the section 7 consultation process, that are affected directly or indirectly by their actions and not merely the immediate area, and the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent, as noted in *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976). Further, the Fifth Circuit's holding in *Coleman* is binding precedent in the Eleventh Circuit. *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981). In this case, the court ruled that indirect effects of private residential development resulting from the proposed construction of highway interchanges had to be considered as impacts of a proposed Federal highway project, even though the private development had not been planned at the time the highway project was proposed. It should be recalled that "take" includes any indirect actions such as the intentional or unintentional harassment, harm, pursuit, wounding, or killing of individual animals, and the degradation or modification of habitat such that essential behavioral patterns are impaired. Therefore, the Service has and will continue to evaluate these indirect effects of watercraft access development on manatees and believes there is a link between these facilities and manatee mortality and harassment.

Under section 7 of the ESA, indirect effects are those effects that are caused by or result from the proposed action, are later in time, and are reasonably certain to occur throughout the life of the project. The types of action under consideration include permitting or authorizing activities, including funding, that facilitate watercraft access and operations. The trends described above demonstrate that a positive correlation exists between watercraft use of Florida's waterways, access facilities, and watercraft related incidental take. It is difficult to attempt to predict with absolute certainty whether or not any given dock or boat ramp will result in watercraft related specific, future take of manatees given the current state of knowledge. The evidence of watercraft related incidental take of manatees is based on probabilities and trends. As the number of access structures and total boating activities increase, so does the incidence of watercraft related incidental take of manatees. Incidental take of manatees is reasonably certain to occur as additional watercraft access structures are added to waterways used by manatees.

Authorizing a dock or marina or boat ramp in manatee-inhabited areas indirectly affects manatees by increasing the likelihood of manatee mortality, injury, or harassment resulting from interaction or collisions with boats associated with the permitted facility. Placement of boat access points has the potential to concentrate boating activities to that particular vicinity based on the use of the waterways. If this area is frequented by manatees, the likelihood of boat collisions with manatees is increased proportional to the number of boats using the area, given that the boats may be operated in a manner and at a speed that could result in collisions with manatees. Simply put, more boats in areas used by manatees increases the likelihood of boat strikes to manatees.

The data described in the Final EIS demonstrates that a positive correlation exists between watercraft use of Florida's waterways, access facilities, and watercraft related incidental take. The evidence of watercraft related incidental take of manatees is based on probabilities and trends and a thorough assessment of the action, the effects of the specific action on manatees, and any conservation measures that may minimize these effects. As the absolute number of access structures increase, so does the incidence (or probability) of the occurrence of watercraft related incidental take of

manatees. Incidental take of manatees is reasonably certain to occur as additional watercraft access structures are added to Florida's waterways if appropriate measures are not in place. For example, the FMRI database now documents 1,184 living individuals scarred from collisions with boats. Most of these manatees (1,153, or 97 percent) have more than one scar pattern, indicating multiple strikes with boats. Carcasses examined at necropsy also bear healed scars of multiple past strikes by boats; one extreme case, recently noted by the FMRI, had evidence of more than 50 past boat collisions (O'Shea *et al.* 2001).

During our case-by-case site-specific evaluation of each project under section 7 of the ESA, we must determine if the proposed action will adversely affect the manatee. We do this by evaluating the proposed action and its affects to the manatee. We evaluate the proximity of manatee aggregation areas and the travel/migration corridors a manatee may use in the project area in comparison to the possible (or reasonably certain) travel patterns a boater may use that utilizes the dock or facility. This evaluation addresses the reasonable certainty of interactions between boats and manatees. For example, we must determine during the evaluation if the following actions: a boat traveling through a migration corridor used by manatee or a boat traveling to a specific aggregation area to view manatees in their natural surroundings are reasonably certain to occur. We also must evaluate if there are any actions that may indirectly affect the manatees habitat. In addition, to evaluating these types of actions, we also evaluate specific conservation measures for the manatee and we must ensure that they are in place before the activity is conducted in order to reduce incidental take to an unlikely to occur level. Further, we evaluate what protection measures (the prerequisites) are in place in the project area. These three prerequisites are that adequate speed zones exist in the area; signage of these zones is adequate; and speed zone enforcement in the area will be sufficient to prevent a watercraft collision with a manatee from occurring as a result of the project. In cases where the Service concludes that adequate manatee protection measures are in place and incidental take is not reasonably certain to occur, the Service will not recommend the permit application be denied. However, in cases where the Service concludes that adequate manatee protection measures are not in place and incidental take is may be reasonably certain to occur, the Service will not inform the Federal action agency that incidental take cannot be authorized at this time and the project cannot go forward.

LEGAL ISSUES

Comment 1: Some commenters expressed concern that the Proposed Rule does not reflect what "legal effect" will result from the exclusion of the SW Stock (and, therefore, the exclusion of the specified activities occurring in the SW Stock's geographical area).

Response 1: As explained in the Background section of the Proposed Rule, all "take" is prohibited under the MMPA unless otherwise authorized, as well as the ESA. The legal effect, therefore, of not being able to make a negligible impact determination for a particular stock is that any take incidentally resulting from government activities related to watercraft and watercraft access facilities will continue to be prohibited and cannot be authorized until the Service is able to make the required determination in the future. Relatedly, the ESA states that an incidental take exemption cannot be issued through the consultation process for a marine mammal until incidental take has been authorized pursuant to the MMPA. See 16 U.S.C. § 1536(b)(4). Therefore incidental take of manatees, which is reasonably certain to occur as a result of a particular project will continue to be

prohibited under the ESA and cannot be authorized until the Service can make the required determinations under the MMPA.

Comment 2: Some commenters are concerned that the Service inconsistently stated that there are no economic impacts attributable to MMPA rulemaking (only through section 7 of the ESA) in southwest Florida and then the Draft EIS provides a detailed analysis of the economic impacts in southwest Florida as a result of rulemaking.

Response 2: Much of the economic analysis provided in the Draft EIS does not reflect the effect of the Service being able to make a negligible impact determination under the MMPA, but rather the economic effect of current prohibitions remaining in place under the ESA. As explained in the Background section of the Proposed Rule, all “take” is prohibited under the MMPA unless it has been authorized. Take is also prohibited under the ESA unless authorized. When the Service finds that the total taking resulting from particular activities will have a negligible impact on a species or stock of marine mammal, incidental take can be authorized under the MMPA for those activities. Relatedly, once incidental take has been authorized for particular activities under the MMPA, incidental take may also be authorized under section 7 of the ESA, as long as it meets the requirements of the ESA. The MMPA does not contain a consultation requirement for Federal agencies. However, in the Draft EIS the Service analyzed the economic effects of the inability to authorize incidental take under section 7 of the ESA as an interrelated action to its inability to authorize incidental take for particular stocks under the MMPA.

Comment 3: One commenter recommended that a supplemental EIS be prepared prior to publication of a final rule.

Response 3: The Service does not believe that it is necessary to prepare a Supplemental Draft EIS at this time. The Council on Environmental Quality directs Federal agencies to prepare supplements when: 1) “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns,” and 2) “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” (40 CFR 1509.2). Neither of these conditions apply at this time. We have no information, new or already existing, that would lead us to believe that this proposal has significant environmental effects. The primary reason we opted to prepare a Final EIS was because of the public concerns and controversy surrounding the proposal.

Comment 4: One commenter raised concerns that, per the Settlement Agreement, the Service has not adequately addressed cumulative effects by failing to include “detailed assessments of agency programs covered under the regulation.”

Response 4: Through a Settlement Agreement approved by the United States District Court for the District of Columbia on January 5, 2001, the Service agreed that its NEPA evaluation for the MMPA incidental take regulation would “include the direct, indirect, and cumulative effects of the overall MMPA regulation. Detailed assessments of agency programs, including cumulative effects on manatees and their habitat, will occur for any activities proposed to be covered under the regulation.” The Draft EIS and Final EIS satisfy this agreement.

The Service added additional information in the cumulative effects analysis to ensure a thorough review of the effects. For example, we added a thorough analysis the Corps section 10/404 permit program, which is an overarching Federal authorization required for the construction of docks, marinas and boat ramps in Florida. As such, any other Federal or State program (Service, NPS, NOAA, State Grants funded by the Service's Federal Aid Program) that permits water-related activities are also required to obtain a Corps permit to conduct activities that may affect manatees in the waters of Florida. In addition, to the Corps' program, the USCG is involved in permitting marine events (*e.g.*, high speed races and parades and other events) in Florida waters inhabited by manatees, making their involvement essential in the conservation of the Florida manatee. The Service reviews approximately 30 events annually in Florida. The USCG ensures that measures are in place to minimize impacts to manatees. We believe that cumulative effects are addressed by these types of actions conducted during the review of events. For example during one parade, the USCG under 33 CFR 100.734 establishes a one day "Idle Speed, No Wake " zone for all watercraft operating within and immediately adjacent to the event. The USCG typically also provides cutters, patrol boats, and helicopters to assist in speed zone enforcement at these events.

Comment 5: One commenter is concerned that the Service proposed a 120-day effective date of the rule by four months, which they argued is contrary to the Settlement Agreement.

Response 5: Through a Settlement Agreement approved by the United States District Court for the District of Columbia on January 5, 2001, the Service agreed to submit proposed regulations for the incidental take of manatees under the MMPA to the Federal Register within 22 months of entry of an order by the Court ratifying the agreement. Within 28 months of entry of an order by the Court ratifying the agreement, the Service agreed either to finalize the proposed regulations or, if statutory requirements could not be met, publish a negative finding in the Federal Register. The Service's publication in the Federal Register of its final determination in the final rule satisfies these obligations. The APA requires at least 30 days following publication in the Federal Register before a final rule becomes effective. The appropriate effective date for a final rule for incidental take of manatees is under consideration.

Comment 6: Several commenters believe that an extension of time to the Settlement Agreement is needed to resolve issues and to allow adequate public input.

Response 6: Through a Settlement Agreement between the Service, the Corps, a number of environmental groups, and a number of marine industry groups, the Service agreed to complete its determination on whether it could authorize incidental take under the MMPA by May 5, 2003. While the parties agreed that modification of the deadlines in the agreement was theoretically possible, such modifications must be agreed upon by all parties. The Service believes that the time agreed upon among the parties was adequate to allow for extensive public involvement in both the rulemaking and the NEPA process and to complete the rulemaking process.

Comment 7: A number of commenters disagreed that government entities engaged in activities such as authorizing watercraft, permitting construction of watercraft access facilities, or funding construction of watercraft access facilities would want to obtain incidental take coverage under the MMPA.

Response 7: The MMPA generally prohibits “persons” from taking marine mammals. “Person” is defined broadly to include any private person or entity as well as any officer, employee, agent, department, or instrumentality of the Federal government or a State, local, or foreign government. While governments can be held responsible for taking a protected species directly, a number of courts have issued injunctions under the ESA, which contains similar prohibitions and a similar definition of “persons,” against government regulatory agencies that authorize activities that are likely to result in the death or injury of a protected species. While a number of these cases have been brought against Federal agencies, injunctions have also been issued against State, county, or local governments when a court found that the government entity was authorizing a particular activity specifically in a manner that was reasonably likely to result in the taking of the species. A LOA issued to a Federal, State, or county government following a negligible impact finding for a particular stock of manatee would shield that government agency from any liability associated with a taking that resulted from the agency’s authorization of a particular activity.

Comment 8: Some commenters questioned whether the MMPA applies to the waters in which manatees occur.

Response 8: It is clear that Congress intended that the MMPA apply to manatees. The definition of “marine mammal” in the MMPA specifically lists the taxonomic order Sirenia, of which manatees are a member. There are also numerous references in the legislative history discussing the need to protect manatees, including identifying operation of power boats in waters where manatees are found as a serious hazard. The prohibitions section of the MMPA makes it unlawful “for any person . . . to take any marine mammal in waters or on lands under the jurisdiction of the United States; or . . . to use any . . . other place under the jurisdiction of the United States to take . . . marine mammals.” This broad prohibition covers all U.S. waters in which manatees occur. Through this rulemaking, the Service has assessed whether the statutory standard to grant an exception to this prohibition can be met.

Comment 9: Several commenters suggested that the appropriate measure of “negligible impact” for this rulemaking should be the “potential biological removal” level.

Response 9: As explained in the Proposed Rule, the PBR was added during 1994 amendments to the MMPA to address effects on marine mammals from commercial fishing. The MMPA calls for use of the PBR formula only in the section that addresses commercial fishing, whereas Congress retained the negligible impact standard specifically for incidental take resulting from activities other than commercial fishing. The Service has calculated PBR for manatees in the past as part of the stock assessment process, which requires the agency to periodically report on items such as the status of the species or stock and interactions with commercial fisheries for all species under its authority. While the PBR formula is appropriate in the commercial fishing context, it consists of a simplified formula that relies on a limited amount of population information: a minimum population estimate for the species or stock, one-half of the theoretical or estimated net productivity rate, and a recovery factor. The negligible impact standard allows the agency to use all relevant data to assess the effect that anticipated take will have on the species or stock.

Comment 10: Some commenters questioned whether the Service’s assessment took into account the “small numbers” standard of the MMPA.

Response 10: The incidental take provision allows the Service to authorize the incidental, unintentional taking of small numbers of marine mammals when the Service finds that the total taking will have a negligible impact on the species or stock. By regulation the Service has defined “small numbers” to mean the portion of a species or stock whose taking would have a negligible impact on that species or stock. As discussed during the Service’s development of that definition, Congress stated that its intent was to authorize taking that is infrequent, unavoidable, or accidental. The definition of “small numbers” places an upper limit on the term and effectively implements Congress’ intent for the provision.

Comment 11: One commenter questioned the connection between section 6 of the ESA and potential liability.

Response 11: The Service has a cooperative agreement with the State of Florida and as such has found that the State has established and maintained an adequate and active program for the conservation of endangered and threatened species. The Service’s recognition of the State’s management program for threatened and endangered species is unrelated to the point that the State may be regulating watercraft operation or access or even operating watercraft in a manner that could result in the taking of manatees and therefore may want to seek liability protection for these activities.

Comment 12: One commenter asked about the consequences of an entity obtaining or not obtaining a LOA.

Response 12: The holder of a LOA receives liability protection from any incidental taking that occurs as a result of the LOA holder’s activities as long as the holder is in compliance with the terms of the LOA. Any entity that does not obtain incidental take authorization through an LOA remains liable for any take that results from its actions.

Comment 13: One commenter asked about coordination or need for overlapping LOAs such as for both State and Federal permitting programs.

Response 13: For any stock where take resulting from the specified activities is currently having a negligible impact on the species, authorization can be granted to all entities engaged in the specified activities that are interested in obtaining liability protection and willing to comply with the terms of the LOA. For any stock where additional mitigating measures are needed to ensure that take over the term of the regulations will be reduced to the negligible level, sufficient entities able to implement the necessary measures must implement those mitigating measures before the Service can issue LOAs to any applicant.

Comment 14: A number of commenters expressed concern that the rule would result in a “moratorium” on development.

Response 14: The incidental take authorization process does not restrict activities, but rather may allow some activities to go forward by authorizing incidental take associated with the activity that would otherwise be prohibited. Currently, the Service is not able to authorize incidental take under the ESA for any activity that is reasonably certain to cause the lethal or nonlethal taking of a manatee. If the Service is able to find that the taking associated with these activities is having a negligible effect on a particular stock, the agency can authorize incidental take for specific activities under both the ESA and the MMPA.

Comment 15: Some commenters expressed concern that a moratorium on development will result since the rule does not take effect for 120 days and even longer for the SW Stock where a negligible impact finding was not proposed.

Response 15: The proposed regulation was unclear and would be amended to clarify that the regulations authorize incidental take of manatees, not the activities themselves. Therefore, there is no requirement to receive a LOA prior to conducting an activity, and conducting one of the specified activities without holding an LOA is not a violation of the MMPA. Rather, any entity that engages in an activity that causes the taking of a manatee without incidental take protection in place remains liable under the MMPA for that unlawful taking. Relatedly, until LOAs have been issued under the MMPA, incidental take cannot be authorized under the ESA for those Federal activities that are reasonably certain to cause the taking of a manatee.

Comment 16: A number of commenters stated their belief that the Proposed Rule infringes on private property rights or constitutes a constitutional taking of their property and requested payment for losses.

Response 16: As explained above, the MMPA rulemaking process allows the Service to authorize incidental take that is currently prohibited by Federal statute. As such, the taking of a manatee by one of the activities described in the rule would not be a violation of the MMPA once the agency finds that measures committed to by the holders of LOAs ensure that the overall level of taking will remain at the negligible level. Relatedly, the Service could issue an incidental take statement as part of its ESA consultation process once incidental take has been authorized for the activity under the MMPA. Both of these have the effect of providing exceptions to the general prohibitions against taking currently in place under both the ESA and the MMPA. The Service therefore believes that the effect of a negligible impact determination would be fewer restrictions on private property use, not more.

Comment 17: One commenter suggested that a regulatory process similar to that used by NOAA-Fisheries be considered in streamlining the administration of the rule.

Response 17: The Service will continue to consider all suggestions on how it can better administer the MMPA incidental taking authorization process through streamlining mechanisms. Any changes along the lines suggested by the commenter would require a separate rulemaking process to amend our general regulations at 50 CFR 18.27. Such an amendment must be consistent with requirements under the APA, and therefore such changes cannot be made prior to when a final determination for these stocks is due.

Comment 18: One commenter suggested that the Service add a statement in the rule that application for a LOA is not an admission that the applicant will cause the taking of manatees.

Response 18: We encourage any entity that conducts activities that may result in the taking of one or more manatees to work with us to develop appropriate mitigating measures and then apply for a LOA to cover any incidental take that may occur. But showing that a particular activity by a particular entity has resulted in, or is reasonably likely to result in, a taking requires a detailed analysis of the specific facts of the situation. Therefore, we may not be able, in most cases, to determine at the time of application for a LOA the likelihood that a particular entity's activities will cause the taking of one or more manatees, much less gauge whether an application is an "admission of liability." We can only encourage participation in the rulemaking process and application for a LOA by any entity whose activities have the potential to result in a taking.

POTENTIAL SOCIAL/ECONOMIC IMPACTS

General Issues

Comment 1: One commenter believes that the Service inconsistently states that there are no economic impacts attributable to MMPA rulemaking (only through section 7) in southwest Florida, and then the Draft EIS provides a detailed analysis of the economic impacts in southwest Florida as a result of rulemaking.

Response 1: The economic analysis focuses on activities affected by the alternatives presented in the Final EIS that are likely to result in economic impacts. In order to measure the incremental impact of this rule, it was necessary to quantify the existing economic impacts of manatee conservation efforts for activities that would change under different alternatives analyzed in the Final EIS. In particular, because the alternatives considered under the Final EIS might enable the Service to concur with some permits for which it was otherwise unable to do so (specifically in the Atlantic region under Alternative 3), it was necessary to determine the costs of existing watercraft access permitting activities. After clarification of the baseline conditions against which the economic impacts of the alternatives are measured, there would be only minimal impacts due to the potential issuance of LOAs under Alternative 2. Alternative 3 would result in a benefit due to the ability of the Service to concur with additional permits. See Appendix M for details.

Comment 2: Various commenters provided information regarding permitting applications that were being held or had been denied based on the Service's review.

Response 2: Permitting is being restricted under section 7 of the ESA. These restrictions are part of the baseline conditions that currently exist. As a result, to the extent that an incidental take rule would enable permitting activity that was previously not approved, an economic benefit would result.

Comment 3: Several commenters stated that it was unclear how the 37 percent permit denial rate was chosen.

Response 3: The Service determined this figure based on expected numbers of permits for which the Service would likely issue letters of non-concurrence, recommending that the Corps deny the permit application. A more detailed analysis of current permitting activities has been performed to determine the current levels of permits likely to be issued a non-concurrence letter, recommending that the Corps deny the permit. Based on this analysis, for the USJ and NW stocks, the permit denial rate remains unchanged at 0 percent. However, based on the number of permits currently being held, in the SW Stock, the permit denial rate for both residential and non-residential permits has been updated from 37 to 20 percent. For the Atlantic Stock, based on current conditions, the permit denial rate has been adjusted from 37 to 0 percent for residential permits and 8 percent for non-residential permits. This calculation is explained in more detail in Appendix M.

Comment 4: One commenter stated that the limited assessment of the economic impacts associated with “reduced” dock construction in southwest Florida not only ignores the other “specified activities” that the rule states requires authorizations, but the numbers reflected are significantly underestimated. The Service is referred to the 1999 Annual Marine Industry Economic Report and the 1999/2000 Florida Marine Industry Economic Report for information that refutes the Service’s economic impact calculations.

Response 4: The economic analysis focuses on activities affected by the alternatives presented in the Final EIS that would be likely to result in economic impacts. In order to measure the incremental impact of the alternatives, it was necessary to quantify the existing economic impacts of manatee conservation efforts for activities that would change under different alternatives analyzed in the Draft EIS. In particular, because the rule might enable the Service to concur with some permits for which it was otherwise unable to do so (specifically in the Atlantic region under Alternative 3), it was necessary to determine the costs of existing watercraft access permitting activities. While the other specified activities that would require authorization under an incidental take rule are certainly resulting in some current costs, these costs were not expected to change under any of the alternatives analyzed in either the Draft EIS or Final EIS, and therefore were not quantified.

In addition, the referenced 1999 Annual Marine Industry Economic Report provides average expenditures for food, clothing, fishing equipment and recreational supplies for various size boats. The estimates were generated from a non-random sample of boat owners. It is unclear if these estimates are per trip or per year figures. Because it is unclear how these estimates were calculated and no data were provided to enable interpretation of these results, we did not integrate this information into the analysis. In addition, the report does not provide any data that could be used to analyze the economic impact of decreases in marine construction. The commenter did not provide the 1999/2000 industry economic report.

Comment 5: One commenter at the Fort Myers public meeting stated that the \$155,000 in sales for Charlotte County was incorrect.

Response 5: It appears that the commenter misread the Draft EIS. The figure for Charlotte County was in thousands, reflecting \$155 million in total sales. In addition, the commenter was comparing his construction company to this figure, but this figure represented sales for the Sporting Goods and Food and Accommodation industries.

Comment 6: Several commenters believed the value for a day of boating of \$40/day used in the analysis was too low. One commenter compared the \$40/day value to the expenditures a boater might incur for a day of boating. Another commenter identified the value of a boating trip to be \$280 from a report by Thomas and Stratis (2001).

Response 6: The \$40/day value represents a boater's willingness to pay for a day of boating. This figure is intended to represent the consumer surplus that is lost when the consumer is unable to participate in the boating activity. Consumer surplus is based on the principle that some consumers benefit because they are able to purchase goods or services at a price that is less than their total willingness to pay (*i.e.* the maximum amount they would pay for a good). In this case, the \$40/day figure represents an estimate of consumer surplus for a day of boating, based on the average of three studies (Bhat *et al.*, 1998; Bergstrom and Cordell, 1991; Walsh *et al.*, 1992). The expenditures made by a consumer in a day of boating are a different value and do not reflect consumer surplus, or willingness to pay.

Citing the \$280 from Thomas and Stratis (2001) is not appropriate for analysis of the alternatives presented in the Final EIS. The \$280 estimate includes expenditures (called "market values" in the cited study) and consumer surplus estimates for non-market goods (called "personal values" in the cited study). Expenditures and consumer surplus estimates are independent measures that cannot be added together to obtain a single value. Moreover, the consumer surplus and expenditure estimates reported in the study are hypothetical examples. However, the background report to the cited study provides a consumer surplus value that represents the annual value for an additional boat ramp/pier in three selected Florida cities.¹ This per boat ramp/pier value is not applicable to our analysis of the surplus effects to individual boaters.

Comment 7: A number of commenters provided additional information related to the economic impact of the marine industry in specific areas. Some comments provided results of the economic contribution of the marine industry in general. Other commenters provided data or information on the marine industry that were not substantiated with published reports or data.

Response 7: The regional economic impact analysis presented in the Final EIS reflects a specific economic impact associated with existing manatee conservation efforts, not the contribution of the marine industry or boat dealer industry in general. The analysis of baseline conditions is focused on the continuing impact on expenditures in the marine industry due to existing permitting restrictions, which would result in a number of secondary effects on the Florida economy. Alternative 3 is focused on the regional economic impact associated with increases in recreational boating activity levels and the demand for marine construction services due to the ability of the Service to concur with additional permits. Comments that provided impact analyses of industries in general do not describe the effects of the alternatives or existing manatee conservation efforts and are not integrated into the analysis.

¹ Thomas, Michael H. Ph.D. and Nicolas Stratis, Ph.D. "Assessing the Economic Impact and Value of Florida's Public Piers and Boat Ramps: A Final Companion Report to the Executive Document of March 2001." Prepared for Florida Fish and Wildlife Conservation Commission, March 2001.

In particular, one comment provided estimates of regional economic impacts for the city of Bonita Springs, based on an estimate of 571 new boats each year. The source of this figure is unclear. Comments that provided data or information without citations or published reports were not integrated into the analysis. In addition, because our analysis is based on county-level data, this information is not readily integrated into our analysis.

Comment 8: A number of commenters stated that the best available information indicates that the marine industry in Florida provided \$14.1 billion in economic value to the State in 2000, as well as 181,000 jobs. Some of these commenters suggested that the impact of the Proposed Rule could be from 1, 10, or 25 percent of this \$14.1 billion figure.

Response 8: It appears that this information is based on a 2001 study performed by Thomas J. Murray and Associates for the Marine Industries Association of Florida, entitled “Florida’s Recreational Marine Industry – Economic Impact and Growth 1980 - 2000,” although no citation is provided. This study conducts a regional economic impact of retail sales by motorboat and yacht dealers in the State of Florida (Revenue Kind Code 28). The analysis estimates the direct, indirect, and induced impacts associated with this sector to estimate the \$14.1 billion economic impact. The Final EIS conducts a similar regional economic impact analysis; however, it is focused on impacts associated with existing manatee conservation efforts. Specifically, the Final EIS calculates direct, indirect, and induced impacts associated with increases in recreational boating activity levels and the demand for marine construction services due to the ability of the Service to concur with additional permits. While the Final EIS and the Murray, *et al.* study both provide measures of regional economic impacts, the Murray *et al.* study estimates an impact not associated with the alternatives. Likewise, the estimates of 1, 10, and 25 percent reductions in this value do not reflect the impact of the alternatives; thus, they are not incorporated into the analysis.

Comment 9: A number of commenters believed that the economic analysis was undervalued because it did not take into account the loss of recreational boating tourism dollars.

Response 9: As explained in the limitations section, this is a source of uncertainty in the socioeconomic analysis. Because there was limited information on the number of out-of-state boaters (tourists) using watercraft access facilities in the affected counties, we were unable to quantify this impact. The Service believes that existing and expected marine access limitations could affect decisions to recreate in Florida thus affecting tourism income. However, the Service does not have information on how a change in marine access could affect individual choices of where to recreate. The Service also believes that while increased manatee populations might be a draw for visitors, it does not have information on the extent to which manatee protection efforts could enhance tourism.

Comment 10: A number of commenters believed that the economic analysis was undervalued because it did not take into account various factors including: (a) “secondary (trickle down) issues,” (b) loss of recreational boating jobs, and c) loss of other jobs including marine manufacturing and boating-related service jobs. In particular, one commenter noted that the analysis is not based on current data because the IMPLAN model relies on four-year old data.

Response 10: As part of the economic analysis, a regional economic impact analysis was performed using the IMPLAN model to compute “trickle down” indirect and induced effects related to marine goods and services and construction industries. In this analysis, the regional economic impacts are computed in dollars and employment. These results were presented for consideration in the Draft EIS, and updated results are presented in Appendix M of the Final EIS. The IMPLAN model is commonly used by State and Federal agencies for policy planning and evaluation purposes. IMPLAN draws upon data from several Federal and State agencies, including the Bureau of Economic Analysis and the Bureau of Labor Statistics. IMPLAN translates initial changes in expenditure that are entered into the model into changes in demand for output from affected industries and corresponding changes in demand for inputs to those industries and so on. Our IMPLAN analysis relies upon input/output relationships derived from 1998 data. Thus, in our analyses we assume that this characterization of the Florida economy is a reasonable approximation of current conditions. If significant changes have occurred in the structure of Florida’s economy, our results may be sensitive to this assumption. However, the most recent economic data available for IMPLAN (*i.e.*, 2000) would not significantly change our results. The uncertainties related to the use of the IMPLAN model are discussed in detail in Appendix M of the Final EIS. In addition, no comments were received in response to the Service’s request for input from the public regarding the use of IMPLAN, specifically whether any alternative models to measure regional economic impacts would more accurately capture changes in sector outputs and employment.

Comment 11: Various commenters suggested that the impact on tax revenues from the loss in marine industry revenues was not accounted for in the analysis.

Response 11: The effect of the rule on overall spending patterns cannot be predicted given existing information. Individuals may substitute their consumption of marine industry goods and services to other markets in Florida, other markets outside of Florida, or they may choose to purchase fewer goods and services overall. The regional economic impact analysis performed using the IMPLAN model does provide tax impacts for the marine industry. Where the year-five regional benefit calculated for the marine industry in the revised analysis of Alternative 3 included in Appendix M would be between \$0.1 and \$16.9 million (2001 dollars), the tax benefit would be between \$0.1 million and \$3.1 million. Because of the static nature of IMPLAN, it is impossible to know the ultimate distribution of taxes. However, the expectation is that the tax impact would be lower than that reported in IMPLAN because individuals would likely spend money on other goods in the state.

Comment 12: One commenter asked to see the resources that were used in compiling this information that brought your conclusion to 147 lost jobs.

Response 12: The Draft EIS and Final EIS both contain a regional economic impact analysis performed using the IMPLAN model, which computes the loss of jobs related to marine industry. These documents can be obtained by contacting the Jacksonville Field Office at 904-232-2580 or visiting the Services’ website at <http://northflorida.fws.gov>.

Comment 13: Commenters provided additional information regarding boaters using ramps in Bonita Springs and Lee County, and marina slips and occupancy in Lee County.

Response 13: To the extent possible, this information has been incorporated into the revised analysis. Where appropriate, we have re-written the text or added footnotes to incorporate the new information. In particular:

- One comment notes that the average marina occupancy rates in Lee County range from 100 percent in the winter to 40-60 percent in the summer. These estimates are either within or near the range of estimates provided in the analysis. This information is provided in a footnote in the report.
- One comment indicates that Lee County is not expected to experience a significant increase in marina wet slips in the future. Our analysis is based on historical growth patterns of slip permitting for the stock. Given the fluctuation in marina slip permit numbers over the past five years, we assume that for each stock future permit requests reflect the highest annual permit demand from this five-year period. To the extent that Lee County has experienced a low growth in marina slip supply, this is accounted for in the analysis.
- One comment provides information on the number of boat ramp launches at four ramps in Lee County. Our analysis is based on estimates of the number of boaters using boat ramps, and assumes that each boat ramp user goes boating between 24 to 44 days per year (32 days on average). Without further information on the number of boaters the launch figures represent, we are unable to determine whether these figures are within the range of boat ramp trips we use in the analysis.
- One comment stated that boats less than 26 feet make up 89 percent of boats in Lee County and that all of these boats are used at boat ramps. We believe this estimate of boat ramp usage may be overstated, as some portion of boats under 26 feet in Florida are likely stored on residential docks. Our analysis assumes that 66 percent of boat trips originate from boat ramps based on a statewide study (Bell 1995). It is not clear whether the suggested Lee County boat ramp percentage (89 percent) is representative of boat ramp usage in the State or the southwest region. Therefore we continue to rely on the statewide figure provided in the Bell (1995) study.
- One comment provided estimates of marina and boat ramp users surplus losses for the city of Bonita Springs, based on an estimate of 571 new boats each year. The source of the new boats figure is unclear. Comments that provided data or information without citations or published reports are not integrated into the analysis. In addition, because our analysis is based on county-level data, this information is not readily integrated into our analysis.

Comment 14: Commenters believed the analysis overlooked the fact that Florida is a year-round boating and tourist state.

Response 14: The economic analysis does not make any assumptions about the seasonality of boating activity occurring in the State of Florida. The analysis utilizes estimates of boating trips per year, without attempting to determine when these trips might occur.

Comment 15: The Marine Industries Association of Florida and Southwest Florida Marine Industries Association stated that the analysis did not address the potential for denial of permits to construct boat ramps.

Response 15: The denial of boat ramp permits was considered in our analysis. Permitting is being restricted under section 7 of the ESA. These restrictions are part of the baseline conditions. As a result, to the extent that any of the alternatives would enable permitting activity that was previously not approved, an economic benefit would result. We assumed that restrictions on permitting multi-slip watercraft access facilities was affecting boat ramps. In particular, under baseline conditions, we assumed existing ramps would become more crowded, and estimated a range of consumer surplus loss that would result. In the revised analysis of Alternative 3, we estimated the benefits that would result if the Service were able to concur with additional boat ramp permits. See Appendix M for details.

Comment 16: The City of Jacksonville, Florida, Waterways Commission submitted the Annual Update of the Duval County Manatee Protection Plan Population Inventory and Analysis, 2001-2002 (Jacksonville University, September 2002). This updates the county's inventory of marinas and reflects some changes.

Response 16: The inventory indicates that Duval County has a total of 36 marinas, 2,299 wet slips and 2,213 dry slips. Our estimates of marina users' surplus impacts are based on the impact of current permitting restrictions on the growth in marina slips. Under baseline conditions, the analysis focuses on unmet marina demand as the basis for marina user's consumer surplus loss estimates; the slip information does not directly enter into the consumer surplus calculation. Unmet demand is based on an assumption about future permit denials and on historical permitting information. The historical permitting information used includes that from 2002 and should reflect the additional slips noted in the inventory. The inventory also indicates that 87 percent of the wet slips are occupied and 88 percent of the dry slips are occupied. These estimates are within the range of that provided in the analysis. The analysis assumes that the average occupancy estimates throughout the year range from approximately 50 to 90 percent. This occupancy information has been incorporated into the analysis in a footnote.

Comment 17: Various commenters wrote about the shortage of marine access facilities and indicated that boat ramps were already crowded.

Response 17: This is an underlying assumption in the economic analysis. Because of the increased cost of marina facilities and overcrowded conditions at boat ramps, it is assumed that some boaters will choose not to participate in boating activities under baseline conditions. The analysis considers this in calculating economic impacts.

Comment 18: Various commenters wrote that rather than curtail their boating activity because they cannot build a dock, boaters will find other alternatives and the number of watercraft (boaters) on the water would not change.

Response 18: Based on updated information indicating that permitting of single-family residential docks is not expected to change under any of the alternatives, the analysis no longer estimates consumer surplus impacts for boaters who cannot build and use a residential dock. Therefore, this comment is no longer applicable.

Comment 19: One commenter indicated that not every dock has a boat moored to it and that most boats are used less than 25 times a year.

Response 19: Based on updated information indicating that permitting of single-family residential docks is not expected to change under any of the alternatives, the analysis no longer estimates consumer surplus impacts for boaters who cannot build and use a residential dock. Therefore, this comment is no longer applicable.

Comment 20: Charlotte County provided figures regarding average value of docks and boat lifts.

Response 20: It is unclear what the County means by "value" of a dock or lift. Assuming that it reflects consumer surplus value, these estimates are not appropriate for the analysis for two reasons. First, the analysis calculates marina users' surplus impacts by applying the number of affected boating days to a surplus estimate for a boating day. Second, the economic impacts of marina construction use the average cost of building a dock rather than the dock's average valuation.

Comment 21: The City of Cape Coral suggested that Congress intended for the \$100 million criteria to be countrywide and a proportional adjustment might be appropriate in determining whether an OMB review is required.

Response 21: The \$100 million criteria is established as a measure of whether a regulatory action is "significant" under Executive Order (E.O.) 12866. This is an order signed by the President, rather than enacted by Congress. Specifically, the E.O. defines a significant regulatory action as one "that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more..." The E.O. does not define the geographic scope of "the economy." While the E.O. does attempt to determine a proportional adjustment appropriate for any given rule, it does further define a "significant regulatory action" as one that may "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local or tribal governments or communities." These are the criteria that the Service uses to determine whether a rule is a significant regulatory action. As such, after clarification of the baseline conditions against which incremental economic impacts of alternatives are measured, the Service finds that the alternatives, as defined in the Final EIS, would result in only minimal impacts at most. Thus, the Service would not consider any of the alternatives to be a significant regulatory action; however, the Office of Management and Budget reserves the right to review any rule under E.O. 12866.

Comment 22: The State's Department of Community Affairs commented that the study should be refined to take into account the economic factors affecting different areas of Florida rather than relying on regional and statewide averages.

Response 22: Ideally, the study would look at individual cities and areas in Florida. However, for the purposes of this rulemaking and the limited timeframe for completing the analysis, this was not warranted or feasible. The public comment period provided the opportunity for the public to provide additional information. In cases where relevant information was provided, we have integrated these data into the revised economic analysis presented in Appendix M.

Comment 23: The State's Department of Community Affairs commented that the study should be peer-reviewed.

Response 23: The timeline for publishing this rule established under the Settlement Agreement with Save the Manatee Club precludes the possibility of a peer review for the study. The availability of the Draft EIS for public comment provided for an informal review of the study as required under the regulatory process.

Comment 24: The rule does not contain any estimates of the "socioeconomic impacts of the extinction of the manatee."

Response 24: The comment is correct; however, under none of the alternatives is the manatee expected to become extinct. Because biological studies do not indicate that this may be the case in any of the alternatives, the Draft EIS and Final EIS do not address this socioeconomic impact.

Comment 25: One commenter suggested that there is an economic impact associated with tourists visiting Florida who want to view manatees in the wild.

Response 25: Very few studies are currently available to address this issue. It was not possible to conduct the necessary studies to quantify these types of benefits that would be associated with this specific rule in the available timeframe.

Comment 26: One commenter asked whether the published rule sought "economic impact advice from the State of Florida, the Marine Industries Association of Florida, the Florida Marine Contractors Association, Coastal Conservation Commission, Association of Community Developers, effected communities and counties."

Response 26: Given the time available, we gathered and utilized the best available information to prepare the Draft EIS and Final EIS. As part of the draft, the Service requested additional information on a variety of topics including socioeconomic issues. Additional information provided to the Service has been considered in the revised economic analysis.

Comment 27: One commenter provided an estimate of the total economic impact to Bonita Springs.

Response 27: The source of the new boat figure on which this analysis was based is unclear. Comments that provided data or information without citations or published reports are not integrated into the analysis. In addition, because our analysis is based on county-level data, this information cannot be readily integrated into our analysis.

COMMENTS RELATED ECONOMIC IMPACT ASSOCIATED WITH LOAs

Comment 1: Several commenters stated that costs related to complying with the conditions of each LOA are not determined in the analysis. One commenter stated that the analysis fails to address agency funding that would be needed to implement LOAs. Another commenter noted that private facilities cannot obtain an LOA and related impacts to these facilities have not been analyzed.

Response 1: To the extent possible, costs of implementing the LOAs were estimated and discussed in the Administrative Costs section of the socioeconomic analysis. The Service does not expect that the LOAs will result in any significant costs to any agencies or private entities. While costs of the LOAs are difficult to exactly determine until a specific agency applies for an LOA, the Service has determined that these costs will primarily fall on the agencies that apply for LOAs, and costs to these agencies are expected to be minimal.

Comment 2: Several commenters indicated that they believe the rule will result in a temporary moratorium in dock permitting until Letters of Authorization can be issued. As a result, these commenters suggest there will be an economic impact on property values and/or an economic impact on the marine industry that the analysis does not take into account.

Response 2: Permitting is being restricted under section 7 of the ESA and the Settlement Agreement. These restrictions are part of the baseline conditions that would exist with or without the incidental take rulemaking. To the extent that any of the alternatives would enable permitting activity that was previously not approved, economic benefits may result.

COMMENTS RELATED TO REGULATORY FLEXIBILITY ACT (RFA)/ SMALL BUSINESS REGULATORY ENFORCEMENT ACT (SBREFA) ANALYSIS

Comment 1: The Small Business Administration (SBA) Office of Advocacy (“Advocacy”) believes that the Service may be required to complete an Initial Regulatory Flexibility Analysis.

Response 1: Based on the revised economic analysis, the Service feels that Advocacy’s comments can be addressed to provide a “factual basis” to support its certification that the alternatives considered in the Draft EIS would not have a significant economic impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis would not be required.

Comment 2: Advocacy recommends that the Service refine its analysis in order to determine whether a substantial number of small entities will be significantly affected by the rule. In particular, Advocacy suggests that (1) rather than compare construction industry impacts to statewide construction revenues, the Service should limit the analysis to include only those marine construction firms performing regulated work within the 12 counties where the Service believes the rule would restrict construction; and (2) rather than use NAICS code 451 revenues for affected counties to represent sporting goods revenues to gauge the impact on small business in the marine recreation sector, the Service should limit its analysis to establishments that could be subject to the Proposed Rule. Advocacy further recommends that if appropriate data are not available, the Service should publish a supplemental notice in the Federal Register soliciting comments on small entity burden.

Response 2: After clarification of the baseline conditions against which incremental economic impacts of alternatives are measured, the alternatives as defined in the Final EIS would result in only minimal impacts. Under Alternative 1, as no incidental take would be authorized, this alternative would impose no incremental economic impacts. Under this alternative, the Service and other agencies would continue their existing activities related to manatee conservation efforts. Under Alternative 2, the only incremental impacts would be administrative cost of the issuance of LOAs under the MMPA. These administrative costs would be incurred by the Service and by those

agencies that choose to apply for an LOA. To the extent that any of the agencies applying for an LOA are small entities, it would not be expected to be a substantial number of entities or a significant economic impact. Under Alternative 3, the incremental impacts would include the minimal administrative costs of issuing LOAs, as well as benefits related to the Service's ability to concur with additional watercraft access facility permits. To the extent that this change in permitting policy would allow small entities to obtain permits, small entities could incur benefits.

Comment 3: Advocacy states that the analysis must consider the impacts on small entities in areas other than the SW Stock. In particular, Advocacy suggests that LOAs would likely impose economic effects on small entities such as the cost of biological opinions, mitigation/project modification costs, and monitoring costs.

Response 3: Small entities are currently incurring costs related to complying with permitting restrictions imposed under section 7 of the ESA. The impacts of alternatives presented in the Final EIS in areas other than the SW Stock are administrative costs associated with the issuance of LOAs, and benefits related to a change in permitting restrictions. As agencies receive authorization for their activities related to issuance of permits to small entities, the restrictions associated with these permits (*i.e.*, requirement of biological opinions, project modifications, monitoring) would not be likely to change. To the extent that any of the agencies applying for an LOA would be small entities, it would not be expected to be a substantial number of entities or a significant economic impact. In addition, there could be benefits incurred by small entities related to the Service's ability to concur with additional watercraft access facility permits. Therefore, based on the revised economic analysis, the Service would not expect any significant costs to small entities under the alternatives presented in the Final EIS.

Comment 4: Advocacy recommends that the Service outline economic benefits to small entities under the Proposed Rule and to ensure that economic benefits to one group are not used to defray otherwise significant impacts on another group of small entities.

Response 4: Potential benefits of the alternatives presented in the Final EIS are associated with the Service's ability to concur with additional watercraft access facility permits in the Atlantic Stock under Alternative 3. To the extent that this change in permitting policy would allow small entities to obtain permits, this would result in economic benefits. However, given that the only incremental costs would be minimal administrative costs related to the LOA process, Advocacy's concern is no longer applicable.

In addition, Federal courts and Congress have indicated that an RFA/SBREFA analysis should be limited to direct and indirect impacts on entities subject to the requirements of the regulation. As such, entities that are not directly regulated by a proposed incidental take rule would not need to be considered in the RFA/SBREFA screening analysis. For example, small entities that would apply for an LOA would need to be considered, while small entities that receive a permit from an agency that had applied for an LOA would not need to be considered.

Comment 5: One commenter suggested that the rule could impact Florida boat manufacturer's ability to compete with offshore boat building countries and boat building companies in other states.

Response 5: This comment refers to potential impacts to entities indirectly affected by the rule. Federal courts and Congress have indicated that an RFA/SBREFA analysis should be limited to direct and indirect impacts on entities subject to the requirements of the regulation. As such, entities indirectly impacted by the reduction in demand for boat building, and, therefore, not directly regulated by the incidental take regulation, need not be considered in this screening analysis.

Comment 6: Several commenters believe that the rule could have a disproportionate impact on certain areas, specifically Cape Coral and Charlotte County.

Response 6: The economic analysis focuses on the most likely impacts, including those to affected recreationists and the marine industry. Based on updated information indicating that permitting of single-family residential docks is not expected to change under any of the alternatives, the analysis no longer estimates a loss in consumer surplus for boaters who cannot build and use a residential dock. In particular, the commenter suggests that Cape Coral will be impacted disproportionately because of its 400 miles of canals. Our analysis determined economic impacts based on expected development patterns, determined from recent information on permitting of watercraft access facilities. The amount of waterfront property that exists does not affect the results of our analysis. In the case of Charlotte County, the commenter indicated that 95 percent of businesses in the County are small businesses, but the source of this figure is unclear. Comments that provided data or information without citations or published reports are not integrated into the analysis. Based on the revised economic analysis, the Service does not believe that either Cape Coral or Charlotte County specifically will be disproportionately impacted.

MISCELLANEOUS COMMENTS RELATED TO THE ECONOMIC ANALYSIS

Comment 1: The Environmental Protection Agency requested more information on the underlying approach of the Marine Industry study used to estimate the economic impacts associated with developing speed zones (Baker 1992).

Response 1: This study estimates the potential economic impact of imposing county line-to-county line slow speed limits in Broward County (Baker 1992). It was prepared for the Marine Industries Association of South Florida by the Boating Research Center at the University of Miami to help provide context for Broward County's Protection Plan, which was in the early stages of development when the report was written. The study uses two different surveying approaches to estimate the potential expenditures/sales losses associated with speed zones, with one based on the responses of individual boaters and one based on industry responses. The study does not impose any *a priori* assumptions of the impact of boating zones. Rather, it asks survey respondents to estimate the impact on their boating plans/business if speed zones are implemented. To estimate the total economic impacts, the study uses the Bureau of Economic Analysis's Regional Input-Output Modeling System (RIMS II). The multipliers used by the model appear to be similar to the IMPLAN multipliers used in our analysis to estimate the regional economic impact of the incidental take rule.

To estimate the reduction in the number of boating trips likely to be caused by speed zones, Baker, et, al sent surveys to 1,200 randomly selected boaters asking them how much they spent per boating trip and how much they were likely to reduce their boating if speed zones were implemented.

Because the survey only had a response rate of 16 percent, the mail survey was augmented by a boat intercept survey, which interviewed boaters on weekends between February 15 and March 22, asking the same questions. A total of 365 responses were obtained from the two surveys. Based on the survey results, Baker, *et al.* estimate that a speed limit in the Intercoastal Waterway would reduce Broward County residents' total boating trips by 17 percent, and that the average expenditure per boating trip is approximately \$108. Using this information, the authors calculate a direct impact of \$14.4 million and a total economic impact of \$22.2 million using the RIMS model. It is not clear whether the high non-response rate to the mail survey biases the study's results.

The authors also queried 25 non-randomly selected marine related firms on the effect that the promulgation of speed zones would have on their business. Based on the responses, Baker *et al.* estimate that speed zones would lead to the a 30 percent reduction in total sales in the marine industry, for a total negative impact of \$58.4 million and 846 jobs at the 25 firms surveyed. Because the study relies on a non-random sample, however, it likely biases the economic impacts of speed zone regulations.

It is important to note that this study was cited in the Draft EIS in order to provide available information about existing costs of manatee protection efforts under baseline conditions. The study does not provide information about the incremental economic impacts associated with the alternatives.

COMMENTS RELATED PROPERTY VALUE IMPACTS

Based on updated information indicating that permitting of single-family residential docks is not expected to change under any of the alternatives, the revised analysis no longer estimates surplus impacts for waterfront property owners unable to build residential docks. Therefore, the following comments related to the property value impacts calculated in the Draft EIS are no longer applicable.

Comment 1: A number of commenters provided information regarding the value of waterfront property with the potential to build a dock versus waterfront property without this potential. While some commenters accepted our estimate of \$68,000 difference in value, for the most part commenters believed this value was too low. Commenters suggested that the difference in value for a vacant lot could be \$150,000 – \$200,000. For a house in Charlotte County, one commenter suggested lost value could be up to half the median house value, or \$144,000. Another commenter suggested the difference in value for property with a house in Cape Coral could be \$525,000. Several commenters stated the difference would be half the purchase price or the appraised value. In addition, one commenter suggested that for Alternative 3, the analysis should use \$130,000 as value of water access for the SW Stock based on figures presented in Exhibit 24 (Draft EIS, page 159).

Response 1: Based on updated information, the analysis no longer estimates property value impacts. Therefore, this comment is no longer applicable.

Comment 2: Many commenters believe the estimated number of properties affected by a loss in value is understated. Commenters state that the value of all waterfront lots in southwest Florida has already been affected by the threat of this rule taking effect. Many believe the number of affected

properties should be in the thousands for southwest Florida. For example, the City of Cape Coral indicated that its lots are only 26 percent developed. Other comments indicated that Cape Coral has more than 40,000 waterfront lots. In addition, information was provided regarding the number of dock permits issued in Lee and Charlotte counties.

Response 2: Based on updated information, the analysis no longer estimates property value impacts. Therefore, this comment is no longer applicable.

Comment 3: One commenter questioned whether the derivation of the number of southwest Florida properties that will have a residential slip permit rejected was correct. The commenter believed that the figure of 236 properties was incorrectly calculated based on the underlying assumptions

Response 3: Based on updated information, the analysis no longer estimates property value impacts. Therefore, this comment is no longer applicable.

Comment 4: Many people commented that the analysis does not take into account the economic impacts of slowing development due to lost property value and the resulting decline in lot sales, home sales and homes built. Some commenters believed that without the ability of homeowners to build docks the number of people interested in moving to southwest Florida would be diminished.

On the other hand, a number of other commenters noted that not being able to build a dock would not stop anyone from getting their boats on the water, as they would either use boat ramps or moorings.

Response 4: Based on updated information, the analysis no longer estimates property value impacts. Therefore, this comment is no longer applicable.

Comment 5: Many people suggested that the impact on tax revenues from the loss in property values could be significant. That is, property value reductions in an area may lead to lower real estate and other tax revenues.

Response 5: Based on updated information, the analysis no longer estimates property value impacts. Therefore, this comment is no longer applicable.

Comment 6: One comment provided estimates of private property value loss for the City of Bonita Springs.

Response 6: Based on updated information, the analysis no longer estimates property value impacts. Therefore, this comment is no longer applicable.